STATE OF MICHIGAN
IN THE SUPREME COURT

ESTATE OF BETTY JEAN SHINHOLSTER,
Deceased, by JOHNNIE F. SHINHOLSTER
Personal Representative,

Plaintiff-Appellee

Supreme Court
No. 123720

Court of Appeals
Nos. 225710 and
225736

vs.

ANNAPOLIS HOSPITAL, assumed
name for OAKWOOD UNITED HOSPITALS, INC.,
a Michigan Corporation, DENNIS ADAMS, M.D.,
and MARY ELLEN FLAHERTY, M.D.,
Jointly and Severally,

Defendants-Appellants

Wayne County Circuit
Court No. 97-709041 NH

_____/

AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY

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STATEMENT REGARDING BASIS FOR JURISDICTION

Amicus Curiae Michigan State Medical Society relies upon the Statement Regarding Basis for Jurisdiction contained in the Brief of Defendants-Appellants Annapolis Hospital, Dennis Adams, M.D., and Mary Ellen Flaherty, M.D.

STATEMENT OF QUESTION PRESENTED

Whether the conditions described in exceptions to the lower tier of the medical malpractice noneconomic damages cap must exist at the time the noneconomic damages cap is applied to the jury verdict?

The Court of Appeals would say "No."

Plaintiff-Appellee says "No."

Defendants-Appellants say "Yes."

Amicus Curiae MSMS says "Yes."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus Curiae Michigan State Medical Society relies upon the Statement of Material Proceedings and Facts contained in the Brief of Defendants-Appellants Annapolis Hospital, Dennis Adams, M.D., and Mary Ellen Flaherty, M.D.

INTRODUCTION

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association that represents the interests of over 14,000 physicians in the State of Michigan. MSMS spent years analyzing the medical liability crisis in Michigan and joined numerous other organizations and entities advocating the promulgation of tort reform legislation, including a limitation on the recovery of noneconomic damages.

As first enacted in 1986, the limitation on noneconomic damages in medical malpractice cases contained seven exceptions, including death, loss of a limb, loss of a vital bodily function, and others. All exceptions to the cap were removed when the statute was amended in 1993. However, a two-tier cap was enacted at that time and several conditions were subjected to the higher tier cap, including hemi-, para-, and quadriplegia; cognitive impairment; and permanent reproductive loss or damage.

The amended statute represents the confluence of varied voices, careful investigation and considered choice. It is not ambiguous and clearly indicates the Legislature's intent. The short shrift accorded that intent by the Court of Appeals is wayward and should not be countenanced. Upon review, MSMS respectfully urges this Court to reverse the Court of Appeals and to reaffirm that the plain language of the statute requires that the conditions contained in the exceptions to the lower tier actually exist at the time the cap is applied.

ARGUMENT

This case queries whether the conditions described in exceptions to the lower tier of the medical malpractice noneconomic damages cap must exist at the time the cap is applied to a jury verdict in order for the higher tier to apply? The decedent, Betty Jean Shinholster, suffered a massive stroke on April 16, 1995, was in a coma for several months, and died on August 26, 1995. This action was commenced approximately 19 months after her death.[1]

Although death is not an exception to the lower tier of the damages cap, the Circuit Court refused to limit the recovery of noneconomic damages in accordance with the lower cap, finding instead that the higher cap applied. As the Court of Appeals described the Circuit Court's decision:

> The trial court noted that although the Legislature used the words "is ... hemiplegic," etc., it did not specify at which time the plaintiff must have been in that state for the higher cap to apply. The court ruled:
>
> The the [sic] only sensible way to interpret the statute is to hold that the Legislature intended it [the higher cap] to apply to people who had been rendered cognitively incapable, quadriplegic, etc., from the accident in question. Betty Shinholster met this condition here: as the jury found, she suffered the requisite injuries from the accident – she endured these injuries in the several months she lay in a coma before she died. We thus hold that the higher, $500,000 cap applies.

Shinholster v Annapolis Hospital, 255 Mich App 339, 353; 660 NW2d 361 (2003).

On appeal, the Court of Appeals affirmed the Circuit Court's holding. Rather than apply the well-accepted plain meaning rule, the Court of Appeals allowed itself to "construe" the statute on the ostensible basis that "reasonable minds could differ with respect to [its] meaning." *Id.* at 354. The Court then "construed" the statute, not according to the generally

[1] Mrs. Shinholster's estate commenced this action for medical malpractice on March 25, 1997. Trial began on August 30, 1999, the jury verdict was rendered on September 14, 1999, and judgment was entered January 4, 2000.

accepted rules of statutory construction, but in spite of them. Indeed, although a court is not to "judge the wisdom of a statute," to impose "its own policy preferences under the guise of construction," to "redetermine the legislative choice," to "independently assess what would be most fair or just or best public policy," or even to "protect against anomalous results," *infra* at pp. 12-14, the Court of Appeals admittedly did just that. The Court's holding was *expressly* based on its desire to avoid what it perceived to be the "unfair results" that would have followed had the statute been applied as written (and as contended for by Defendants-Appellants). The Court said:

> We construe the statute in accordance with the trial court's ruling. ***Indeed, the adoption of defendants' position would lead to absurd and unfair results.*** For example, a person who endured months of paraplegia caused by medical malpractice but died of an unrelated and independent cause before the court's verdict adjustments would be subject to the lower cap, whereas a similar person who died a day *after* the court's verdict adjustments would be subject to the higher cap. ***We view the better approach to be*** that advocated by plaintiff and adopted by the trial court. Under this approach, the point of reference for determining whether the injured person fits within MCL 600.1483(1)(a), (b), or (c) is *any time after and as a result of* the negligent action. Therefore, because Shinholster was rendered incapacitated by defendants' negligence, the higher cap applies.

255 Mich App at 354 (emphasis added in part).

Ironically, the Court dismissed Defendants' contention that such a holding would result in a windfall to individuals who suffer only brief paraplegia or another qualifying condition before death, as an issue for the Legislature to resolve, stating:

> [I]t is up to the Legislature, and not the courts, to address the concerns raised by defendants. If the Legislature wishes to amend MCL 600.1483 by making more specific rules regarding compensation for conditions currently enumerated in the statute, it is free to do so.

255 Mich App at 355-356.

The Court of Appeals should have applied this later deference to its interpretation of the statute as a whole. It is up to the Legislature, not the Courts, to determine whether the lower cap exceptions should be applied to a patient who experiences the conditions *"at any time after and as a result of the negligent action."* The Legislature, through its use of the present tense verbs "is" and "has," rejected the broader application. The holding in this case is grossly out of sync with the intent of the Legislature, as expressed in the words of the statute. Reversal is thus required.

THE CONDITIONS DESCRIBED IN EXCEPTIONS TO THE LOWER TIER OF THE MEDICAL MALPRACTICE NONECONOMIC DAMAGES CAP MUST EXIST AT THE TIME THE CAP IS APPLIED TO THE JURY VERDICT.

MCL 600.1483 imposes a two-tiered cap on the recovery of damages for noneconomic loss in actions for medical malpractice. Noneconomic damages are generally limited to $280,000 (adjusted by the Consumer Price Index) unless one of three exceptions exists, in which case a higher cap of $500,000 (also subject to adjustment by the Consumer Price Index) applies. The statute provides in pertinent part:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
>
> (i) Injury to the brain.
> (ii) Injury to the spinal cord.
>
> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making

independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

In this case, Plaintiff Personal Representative Johnnie Shinholster successfully invoked an exception to the cap even though the patient, Betty Shinholster, was dead when the action was filed [and consequently, when judgment on the verdict was entered] and did not have the condition for which the exception was invoked. Under the plain language of the statute, the exceptions did not apply. [2]

A. The Application of the Noneconomic Damages Cap, Raising a Question of Statutory Construction, is Subject to De Novo Review.

This appeal presents an issue of statutory construction subject to de novo review. *Pittsfield Charter Township v Washtenaw County,* 408 Mich 702, 707; 664 NW2d 193 (2003); *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 62; 642 NW2d 663 (2002).

B. The Statutory Exceptions to the Lower Cap Impose a Present Tense Requirement.

MCL 600.1483(1) clearly imposes a present tense requirement on the conditions which are excepted from the lower cap. Subsection (a), MCL 600.1483(1)(a), affords an exception to the lower cap when "[t]he plaintiff *is* hemiplegic, paraplegic, or quadriplegic..." (emphasis added). Subsection (b), MCL 600.1483(1)(b), affords an exception when "[t]he

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[2] Whether the noneconomic damages cap applies to wrongful death actions is not an issue in this case. However, this Court is considering that issue in *Jenkins v Patel,* Supreme Court Docket No. 123597. In *Jenkins,* the Court of Appeals held, under the doctrine of ejusdem generis, that the cap did not apply to wrongful death actions because the damages recoverable under the wrongful death act, MCL 600.2922, were not encompassed within the cap's definition of noneconomic loss. 256 Mich App 112; 662 NW2d 453 (2003). MSMS has filed an amicus brief in *Jenkins* opposing the Court of Appeals' holding.

plaintiff *has* permanently impaired cognitive capacity" that render the patient "incapable of making independent, responsible *life* decisions and permanently incapable of independently performing the activities of *normal, daily living*." (emphasis added). Subsection (c), MCL 600.1483(1)(c), affords an exception when there "*has* been permanent loss of or damage to a reproductive organ ..." (emphasis added).[3]

Each of the exceptions connotes a present condition in a living patient. The *American Heritage Dictionary of the English Language* (1981) defines "is" as the "third person singular *present indicative* of the verb be." (emphasis added). "Has" is defined as the "[t]hird person singular *present indicative* of have." (emphasis added). This present tense directive must be given effect.

When reviewing statutory matters, a Court's primary purpose "is to discern and give effect to the Legislature's intent." *Robertson v DaimlerChrysler,* 465 Mich 732, 748; 641 NW2d 567 (2002). In the first instance, the legislative intent is to be derived from the specific language of the statute inasmuch as the Legislature "is presumed to have intended the meaning it has plainly expressed." *Id.* The words used are "not to be ignored, treated as surplusage, or rendered nugatory." *Id.* When the language is clear and unambiguous, judicial construction is not permitted and the statute must be enforced as written. *Id.* As this Court recently explained in *In re Certified Question, Henes Special Projects Procurement, Marketing and Consulting Corp v Continental Biomass Industries, Inc,* 468 Mich 109; 659 NW2d 597 (2003), a case involving the standard for evaluating the mental state required to assess double damages under the Michigan Sales Representative Commission Act:

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[3] This present tense language is consistent with MCL 600.6090 which requires the presiding judge to review *each verdict* to see if the limitations on noneconomic damages applies. *See also*, MCL 600.6304.

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin,* 443 Mich 59, 65; 503 NW2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward,* 460 Mich 230; 596 NW2d 119 (1999). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n,* 448 Mich 22, 27; 528 NW2d 681 (1995).

Id. at 600. *See also, Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29, 32; 658 NW2d 139, 141 (2003)("If the language of a statute is clear, no further analysis is necessary or allowed."); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999)(the Court's primary task of discerning and giving effect to the Legislative intent "begins by examining the language of the statute itself."); *People v Herron,* 464 Mich 593, 611; 628 NW2d 528 (2001)("We must give the words of a statute their plain and ordinary meaning . . . .")(quoting *People v Morey*, 461 Mich 325, 329-30; 603 NW2d 250 (1999)); *Storey v Meijer, Inc*, 431 Mich 368, 376; 429 NW2d 169 (1988)("Legislative intent is to be derived from the actual language of the statute, and when the language is clear and unambiguous, no further interpretation is necessary.").

A court may not speculate about the Legislature's intent beyond the words expressed, *Rheaume v Vandenberg,* 232 Mich App 417, 422; 591 NW2d 331 (1998), but must enforce the law as written. Nor may the court second-guess the wisdom of the statute and use rules of construction as a means of imposing its own policy preferences. As this Court explained in *Robertson, supra:*

> "Our judicial role precludes imposing different policy choices than those selected by the Legislature. ..."

465 Mich at 751 (quoting *People v Sobczak-Obetts,* 463 Mich 687, 694-695; 625 NW2d 764 (2001).

The plain language of the noneconomic damages cap excepts only present conditions. Thus, to determine which aspect of the two-tiered cap to apply, a Court must consider the "present" circumstances of the plaintiff at the time the judgment is entered. None of the higher cap exceptions applied to Mrs. Shinholster when judgment was entered; she had already died, rendering each of the exceptions inapplicable. There being no exception for death, the lower cap clearly applied.[4]

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[4] Death was expressly listed as an exception in the original 1986 version of the statute, which provided in part:

> (1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:
>
> (a) *There has been a death.*
> (b) There has been an intentional tort.
> (c) A foreign object was wrongfully left in the body of the patient.
> (d) The injury involves the reproductive system of the patient.
> (e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.
> (f) A limb or organ of the patient was wrongfully removed.
> (g) The patient has lost a vital bodily function.

(emphasis added). All of the exceptions to the cap were removed when the statute was amended in 1993, although certain circumstances (not including death) were subjected to a higher cap. *See e.g.,* the subsection (a) through (c) conditions. It is a general rule of statutory construction that an amendment to a statute is to be construed as changing the statute amended. *Huron Twp v City Disposal Sys, Inc,* 448 Mich 362, 366; 531 NW2d 153 (1995). Further, when the Legislature "has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected." *In re MCI,* 460 Mich 396, 415; 596 NW2d 164 (1999). The absence of any exception for death subjects it to the lower cap. Extensive legislative history supports this conclusion including legislative journals which reveal multiple *defeated* attempts to include death as an exception to the lower cap (but subject to the higher cap), 1993 Journal of the House at 953, 993-995 and also reflect various protests to the 1993 Act because the cap would apply to wrongful death actions. 1993 Senate Journal at 280, 1773-1775. Excerpts from the legislative journals are included in the brief and/or appendix of Defendants-Appellants.

B. The Lower Cap Exceptions Cannot Be Construed to Extend Beyond Their Plain Meaning.

Grounded as they are in the present tense, the lower cap exceptions must not be construed to encompass past conditions. Rather, the verb tense used by the Legislature must be given effect. This Court recently adhered to this rule in *Michalski v Reuven Bar-Levy*, 463 Mich 723, 733; 625 NW2d 754 (2001). Interpreting phrases contained in the Handicappers' Civil Rights Act as requiring a present tense condition, this Court said:

> [W]e note that the phrase "regarded as having," found in subsection (iii), and the phrases "substantially limits" and "is unrelated" found in subsection (i)(A), all appear in the present tense. Depending on whether a plaintiff is proceeding under the "actual" or "regarded as" portions of the statute, because of the Legislature's choice of present tense language in defining the term handicap, we must evaluate the physical or mental characteristic at issue either (1) as it actually existed at the time of the plaintiff's employment, or (2) as it was perceived at the time of the plaintiff's employment.

Id. at 733 (footnote omitted). *See also, Chmielewski v Xermac, Inc.*, 457 Mich 593, 610, n 20; 580 NW2d 817 (holding that the law requires the factfinder to assess the individual's condition as it actually exists and stating that "one could not seriously characterize as 'strained' an analysis that honors the Legislature's choice of the present tense.").

The Court of Appeals gave similar deference to the Legislature's choice of verb tense in construing a venue statute that required the defendant's presence in the county in which the action was brought. *DesJardins v Lynn*, 6 Mich App 439; 149 NW2d 228 (1967). In *DesJardins*, the Court explained:

> Section 1621 speaks in terms of the county in which any defendant *is* established; section 1625 speaks in terms of a person being established where he "*has* a dwelling place," "*has* a place of business," or *is* doing business."

> Such words are present tense rather than past tense and that construction must be accorded them.

6 Mich App at 442 (emphasis in original). More recently, in *Deschaine v St. Germain,* 256 Mich App 665; 671 NW2d 79 (2003), a grandfather was denied custody of his granddaughter after her mother's death because a statute required that one of the child's parents "permit" the child to live with the would be guardian at the time the request for custody is initiated. The child's mother had previously permitted the daughter to live with her grandparents but the daughter was living with her mother at the time of the mother's death. Noting that the term "permit" is "in the present tense," the Court said the permission referred to in the statute "must be currently occurring" and:

> at the time of Julie's death, Julie was not allowing Tiffany to live with Robert and Joyce, no matter what her past course of conduct or future intention was regarding this issue.

Id. at 671. Citing *Random House Webster's College Dictionary* (2001), the Court noted that "present tense" means "being, existing, or occurring at this time or now ..." *Id.* at 672.

Other Courts have also adhered to the legislative intent in giving effect to a statute's verb tense. In *In re Arochem Corp,* 176 F3d 610 (CA2 1999), the Court interpreted a federal statute that permitted representation of an estate by professionals "that do not hold or represent an interest adverse to the estate." *Id.* at 623. The proposed trustee was challenged because he had previously represented a party asserting claims against the estate. Rejecting the challenge, the Court said:

> At the outset, we note that section 327(a) is phrased in the present tense, permitting representation by professionals "that do not hold or represent an interest adverse to the estate," and limiting the class of acceptable counsel to those "that are disinterested persons." 11 USC § 327(a) (emphasis added). "Congress' use of a verb tense is significant in construing statutes." *United States v Wilson,* 503 U.S. 329, 333, 117 L.Ed.2d 593, 112 S. Ct. 1351 (1992); see *Otte v United States,* 419 U.S. 43, 49-50, 42 L.Ed.2d 212, 95 S.Ct. 247

> (1974)(interpreting provision of Internal Revenue Code and according significance to Congress' use of both past and present tenses). Thus, counsel will be disqualified under section 327(a) *only if it presently "holds or represents an interest adverse to the estate," notwithstanding any interests it may have held or represented in the past.*

176 F3d at 623 (emphasis added). *See also, United States v Wilson,* 503 US 329, 333 (1992)("Congress' use of a verb term is significant in construing statutes"); *United States v Valentine,* 63 F3d 459, 463 (CA6 1995)(same).

Other statutory limitations must also be respected. Exemptions in a statute are to be "carefully scrutinized and not extended beyond their plain meaning." *Grand Rapids Motor Coach Co v Public Service Comm,* 323 Mich 624, 634; 36 NW2d 299 (1949); *Rzepka v Farm Estates, Inc,* 83 Mich App 702, 706-707; 269 NW2d 270 (1978)("statutory exceptions are to be given a limited, rather than expansive construction"). When a statute expressly mentions one or more exceptions, other exceptions that are not mentioned cannot be implied. *See In re MCI,* 460 Mich 396, 415; 596 NW2d 164 (1999)("The express mention of one thing in a statute implies the exclusion of other similar things."); *Kaufman v Carter,* 952 F Supp 520, 529 (WD Mich 1996)("Where 'exceptions to [a statute's] sweeping language are carefully enumerated ... the express enumeration indicates that other exceptions should not be implied.'").

The Court of Appeals' impermissible extension of the lower cap exceptions beyond their present tense requirements violates these principles of statutory construction. If the Legislature had intended the exception to apply if the patient had experienced the excepted condition "at any time after and as a result of the malpractice," the Legislature would have worded the exceptions to so state, *i.e.*, "[t]he plaintiff *is or was* hemiplegic, paraplegic, or quadriplegic..."; "[t]he plaintiff *has or had* impaired cognitive capacity..." The absence of

the verbiage necessary to add this past tense meaning cannot be added by judicial fiat. *See e.g., In re MCI* 460 Mich at 414 ("Reviewing the language of the statute, it is apparent that for § 312a to have the meaning imposed upon it by the Court of Appeals and advocated by Ameritech, the Court would need to infer additional language, not present on its face."); *Omelenchuck v City of Warren,* 461 Mich 567, 575; 609 NW2d 177 (2000)(refusing to rewrite the tolling statute to add words to the statute).

C. The Court of Appeals Overstepped Its Authority In Basing Its Decision on Policy Preferences.

The judiciary does not have the authority to judge the wisdom of a statute or to implement its own policy preferences under the guise of construction. Observing that "it is not the province of this Court to make policy judgments or to protect against anomalous results," this Court explained in *Hanson v Bd of Co Rd Comm'rs*, 465 Mich 492, 501-502; 638 NW2d 396 (2002):

> Reasonable minds can differ about whether it is sound public policy to so limit the duty imposed on authorities responsible for our roads and highways. However, our function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Our task is to discern the intent of the Legislature from the language of the statute it enacts.

Id. at 504. Similarly, in *DesJardins, supra,* the Court of Appeals did not permit predictions of "horrendous results" to sway it from textually interpreting the phrases "is established," "has a dwelling place," and "has a place of business" as present tense requirements and construing them accordingly. The Court explained:

> Both plaintiff and defendant cite extensions of the positions of their opponent, leading to horrendous results. Such *betes noires* cannot be invoked to counter what obviously was the intention of the drafters of the statute. The committee comment on section 1625, while silent on the specifics of the word "established," is couched in terms of the "now" rather than the "past" and we feel tends to bear out our holding that a person is not established in a given

> county if he does not fit the requirements of the statute at the time suit is started.

6 Mich App at 442-443. Adherence to legislative intent is required even if the Legislature's choice may seem inefficacious or unwise. In *Decker v Flood,* 248 Mich App 75, 84; 638 NW2d 163 (2001), the Court of Appeals explained:

> The Supreme Court's decision in *McIntire* precludes this Court from utilizing rules of statutory construction to impose policy choices different from those selected by the Legislature. *Id.* at 152. "In our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. *Id.* at 159, adopting as its own the language of Judge Young's dissent in *People v McIntire,* 232 Mich App 71, 126; 591 NW2d 231 (1998). Clearly, it is not within our authority to second-guess the wisdom or reasonableness of unambiguous legislative enactments even where the literal interpretation of the statute leads to an absurd result.

248 Mich App at 84 (referring to this Court's decision in *People v McIntire,* 461 Mich 147, 155-158; 599 NW2d 102 (1999)).

The Court of Appeals did not heed these restrictions in *Shinholster.* Indeed, its decision was *expressly based* on its desire to avoid "unfair" results. The Court admitted as much in stating:

> We construe the statute in accordance with the trial court's ruling. Indeed, the adoption of defendants' position would lead to absurd and unfair results. For example, a person who endured months of paraplegia caused by medical malpractice but died of an unrelated and independent cause before the court's verdict adjustments would be subject to the lower cap, whereas a similar person who died a day *after* the court's verdict adjustments would be subject to the higher cap. We view the better approach to be that advocated by plaintiff and adopted by the trial court. Under this approach, the point of reference for determining whether the injured person fits within MCL 600.1483(1)(a), (b), or (c) is *any time after and as a result of* the negligent action. Therefore, because Shinholster was rendered incapacitated by defendants' negligence, the higher cap applies.

255 Mich App at 354 (emphasis in original). The Court of Appeals exceeded its authority in *Shinholster.*[5] Whatever the "fairness" of the Legislative choice, absent the infringement of a constitutional right (which was not alleged), the statute should have been applied as written. Reversal is required.

D. The Legislative Purpose Supports the Requirement that the Conditions Described in the Lower Cap Exceptions Exist at the Time the Cap is Applied.

In upholding the constitutionality of the noneconomic damages cap in *Zdrojewski v Murphy,* 254 Mich App 50; 657 NW2d 721 (2002), the Court of Appeals noted that "the 1993 legislation that created the current finite limitation scheme was prompted by the Legislature's concern over the effect of medical liability on the availability and affordability of health care in the state", citing *House Legislative Analysis, SB 279 and HB 4033, 4403, and 4404,* April 20, 1993, pp 1-2:

> The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs.

254 Mich App at 80. A strict application of the lower cap exceptions furthers this purpose by reducing the liability of health care providers and containing health care costs.

CONCLUSION

In *People v McIntire, supra,* this Court had occasion to review a Court of Appeals' majority decision which held that an obligation to provide truthful answers is an implicit condition of an immunity agreement under MCL 767.6. Adopting as its own the dissenting

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[5] Indeed, as Defendants-Appellants argued in the Court of Appeals, the Court of Appeals' decision will place death cases in the higher cap, contrary to the Legislature's intent, because most plaintiffs experience one or more of the conditions in the § 1483 lower cap exceptions at some point before their death, even if briefly.

opinion of then Court of Appeals Judge Young, now Justice Young, this Court commented on what it perceived as an abandonment of traditional rules of statutory construction:

> These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. ... Unfortunately, the [Court of Appeals] majority has abandoned these traditional rules of construction, ignored the plain text of the statute before us, and substituted its own policy preferences for those of our Legislature ... While [we] do not question the sincerity of [the Court of Appeals majority's] effort, [we] view the [Court of Appeals] opinion as a herculean, yet ultimately unsuccessful, attempt to create an ambiguity where none exists in order to reach a desire result ...

461 Mich at 153. With all due respect, the same can be said of the Court of Appeals' decision here. Reversal is respectfully requested.

RELIEF REQUESTED

Amicus Curiae Michigan State Medical Society therefore requests that this Court reverse the February 14, 2003 published decision of the Michigan Court of Appeals.

Dated: January 16, 2004

KERR, RUSSELL AND WEBER, PLC

By: _____
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_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

Penny L. Milliken, being first duly sworn deposes and says that she is employed with the law firm of KERR, RUSSELL AND WEBER, PLC, attorneys for Michigan State Medical Society, and that on the 16th day of January, 2004, she placed in the U.S. Mail with postage prepaid two copies of the foregoing Amicus Curiae Brief of Michigan State Medical Society and Proof of Service to:

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I certify and declare under penalty of perjury that the foregoing is true and correct.

Penny L. Milliken

Subscribed and sworn to before me
this 16th day of January, 2003.

GAIL R. SHOWLER
Notary [illegible], MI
My Commission Expires [illegible], 2004